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Honorable William K. Suter
Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: *Toby Douglas, et al.* v. *Independent Living Center of Southern California, Inc., et al.*, Nos. 09-958, 09-1158, 10-283

Dear General Suter:

This letter brief is submitted on behalf of certain respondents[1] in response to the Court's order of November 4, 2011, which directed the parties and the Solicitor General to file supplemental letter briefs addressing "[w]hat should be the effect, if any, of the developments discussed in the letter submitted by the Solicitor General on October 28, 2011, on the proper disposition of this case."

The developments discussed in the Solicitor General's letter concern recent decisions by the Centers for Medicare & Medicaid Services (CMS), the agency within the U.S. Department of Health and Human Services that has primary responsibility for administering the federal Medicaid program. In those decisions, issued less than a month after oral argument in the above-referenced case, CMS relied on information newly submitted by California to the agency in September 2011 and approved several, but not all, of the Medicaid reimbursement rate reductions at issue in this case for certain limited time periods beginning on January 1, 2011. S.G. Ltr. 1-3. Before California presented this new material to the agency, CMS had previously found those reductions to violate Section 30(A) of

[1] The respondents joining in this submission are those that joined the merits briefs filed by (i) the intervenor respondents in No. 09-958 and *California Pharmacists* respondents in No. 09-1158, (ii) the *Dominguez* respondents in No. 09-1158, and (iii) the *Santa Rosa* respondents in No. 10-283.

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the Medicaid Act. *Id.* The lower courts in this case had likewise previously held, before CMS issued its initial disapprovals, that California's reductions were inconsistent with Section 30(A), and therefore preempted, and entered preliminary injunctions enjoining the California Department of Health Care Services (DHCS) from implementing them.

For the reasons elaborated below, the recent CMS decisions do not moot the dispute between the parties. There remains a live controversy. Nonetheless, the legal landscape that prompted the Court to grant certiorari has now changed dramatically and therefore the Court may wish to consider whether the proper course to follow at this time is to dismiss the writs of certiorari as improvidently granted. Due to California's concessions before CMS, only a few months of reimbursement claims remain at issue in this case; moreover, due to intervening state legislation primarily adopted after issuance of the writs, the preliminary injunctions at issue have no current prohibitive effect. Because the case has come to this Court on review of the grant of a preliminary injunction, dismissal of the writs will simply cause these matters to proceed in the district courts, which will be able to take into account CMS's intervening decisions in finally disposing of the claims.

1. We begin by reviewing the background of these cases and the circumstances that have changed since the Court granted certiorari. In 2008 and 2009, a diverse group of Medicaid health care and service providers and beneficiaries brought five lawsuits to enjoin rate reductions prescribed by three California statutes: Assembly Bill 5 (AB 5), Assembly Bill 1183 (AB 1183), and Senate Bill 6 (SB 6). The lower courts uniformly held that California had implemented the reductions for budget reasons alone, without conducting the reasonable access studies required by Section 30(A), and further found that the State had improperly implemented the reductions without first obtaining CMS approval. *E.g.*, Pet. App. 28-29, 58-93 (No. 09-958). The courts therefore held the statutes to be preempted, and entered preliminary injunctions halting DHCS from implementing the rate reductions because respondents were likely to succeed on the merits and the reductions would cause irreparable harm, particularly to beneficiaries of Medicaid who would be denied access to critical medical care. *Id.*

In September 2008, after the first of these lawsuits had been filed, California belatedly submitted certain of the rate reductions at issue—those imposed by AB 5 and AB 1183—to CMS for review in separate agency proceedings. U.S. Pet. Br.

App. 1a-3a (No. 09-958). (California did not submit to CMS for review the reductions set forth in SB 6.) In November 2010, after California had consistently failed to respond to requests from CMS (originally presented in December 2008) for information regarding the rate reductions submitted for its review, CMS disapproved those reductions. *Id.* It explained that it could not approve the reductions because, among other things, "California has not demonstrated that it would meet the conditions set out in [Section 30(A)]." *Id.* at 2a (letter dated Nov. 18, 2010). DHCS requested reconsideration of the disapprovals, *id.* at 5a-7a, thereby triggering a formal administrative hearing. Those reconsideration proceedings were pending when this Court granted the petitions for certiorari on January 18, 2011.

CMS now has determined, based on materials submitted in September 2011 during a separate federal agency review process, that some of the rate reductions are, at least in part, consistent with the Medicaid Act. On October 27, 2011, after reviewing the newly submitted materials, CMS issued new decisions approving several of the rate reductions prescribed by AB 5 and AB 1183 for certain periods after January 1, 2011. S.G. Ltr. 1-3. In particular, as explained in the Solicitor General's letter, it now has approved the one- and five-percent reductions in prescription drug and health services reimbursement rates set forth in AB 5 and AB 1183, and the rate reductions and caps on non-contracting hospitals prescribed by those bills. *Id.* at 3. However, in light of certain concessions by California, CMS withheld approval of the rate reductions for the period before January 1, 2011, when the preliminary injunctions in this case were in effect, and the agency did not approve the across-the-board ten-percent reductions imposed by AB 5, in light of California's withdrawal of its request for approval of those reductions (which, as discussed below, had expired in February 2009). *Id.* As previously stated, CMS did not approve or address the In-Home Supportive Services (IHSS) reductions prescribed by SB 6, because California never submitted those reductions for agency review. *Id.* at 1 n.*.[2]

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[2] If the Court does not dismiss the writs, the lack of any federal agency proceedings concerning the IHSS reductions demonstrates why injunctions under the Supremacy Clause are, in general, necessary and important. *See* Cal. Pharm. Merits Br. 19-31; Dominguez Merits Br. 7-20; ILC Merits Br. 19-35; Santa Rosa Merits Br. 12-22. The reductions set forth in SB 6 were targeted at home care providers, who provide critical support services such as bowel and bladder care, ambulation, bathing, oral hygiene, and feeding for individuals who could not otherwise care for themselves. These services and others enable low-income elderly, blind, or disabled individuals to remain in the

There have been a number of other relevant developments following issuance of the writs. Most significant for these purposes, all of the rate reductions subject to the preliminary injunctions in this case have been either repealed, superseded, or suspended. The ten-percent rate reductions prescribed by AB 5 expired in February 2009. See 2008 Cal. Stat. c. 758, §§ 44-45. Certain of the reductions prescribed by AB 1183 were repealed as of April 2011, see 2011 Cal. Stat. c. 3, §§ 93.2, 93.5; 2011 Cal. Stat. c. 19, § 4; 2011 Cal. Stat. c. 29, §§ 12, 13, and others imposed by that bill—in addition to the remaining reductions set forth in AB 5—were superseded by new rate cuts deemed effective as of June 1, 2011, see 2011 Cal. Stat. c. 29, § 13; 2011 Cal. Stat. c. 3, § 93.2.[3] By separate legislation, the California Legislature delayed implementation of the IHSS rate reductions contained in SB 6 until the *later* of July 2012, or a final judicial decision not subject to appeal upholding their validity. See 2010 Cal. Stat. c. 725, § 25, *codified at* Cal. Welf. & Inst. Code. § 12306.1(d)(7)(B). The result of these developments is that, as of June 2011 and continuing to this time, none of the rate reductions challenged in this case is currently in effect.

2. Although the rate reductions at issue in this case are not currently effective, and although CMS has now approved several of those reductions as consistent with federal law, respondents do not believe this case to be formally moot.

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community rather than being placed in institutions. Cal. Welf. & Inst. Code § 12300(a)-(c). Absent the injunction entered in *Dominguez v. Schwarzenegger*, No. 09-02306 (N.D. Cal.), California would have reduced provider payments to just above the minimum wage, causing many providers to quit their jobs and forcing many recipients into nursing homes or other institutions. *See, e.g.*, Dominguez Cert. Opp. Br. 6-7 (No. 09-1158). Because California never sought CMS approval of these reductions, plaintiffs in the *Dominguez* case have no other avenue, such as a claim under the Administrative Procedure Act, to challenge those reductions that are preempted under the Medicaid Act—their only option is an injunction action under the Supremacy Clause.

[3] The most recent California legislation, prescribing the superseding rate reductions, expresaly conditions implementation of those reductions on prior CMS approval. *See, e.g.*, 2011 Cal. Stat. c. 29, § 13. This condition is fully appropriate—and indeed required—because, as both CMS and federal courts have consistently ruled, States are not permitted under the Medicaid Act to implement rate reductions unless and until those reductions have been reviewed and approved by CMS. *See, e.g., Exeter Mem'l Hosp.* v. *Belshe*, 145 F.3d 1106, 1108 (9th Cir. 1998). Although California has not conditioned implementation of the IHSS reductions set forth in SB 6 (at issue in the *Dominguez* matter) on CMS approval, as discussed in the text of this letter, implementation of those reductions has been expressly conditioned on court approval.

Mootness arises when the judgment below no longer has any prospective effect on the legal rights and obligations of the parties. See, *e.g.*, *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969). Here, however, even if the preliminary injunctions have no immediate prohibitive effect, they continue to affect the rights and obligations of the parties because their *retrospective* validity has ongoing relevance to California's related claims for reimbursement. If the injunctions in this case are held to be invalid as of the time they were issued, then California may—and has said that it will, see DHCS Merits Br. 9 n.3—seek reimbursement of the additional funds it paid to the plaintiffs in this case as a result of those injunctions. See S.G. Ltr. 3 (noting possibility of "recoupment" by California of funds allegedly overpaid under injunctions). A situation in which the enjoined statute has been repealed but the injunction has ongoing legal or practical consequences for a party continues to present a "live" controversy. See, *e.g.*, *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 568-72 (1984); see also *Indep. Living Ctr. of S. Cal.* v. *Maxwell-Jolly*, 590 F.3d 725, 729-30 (9th Cir. 2009) (holding prior decision not moot based on Petitioner's representations to Supreme Court of intent to seek recoupment of monies paid pursuant to lower court injunction). Accordingly, the dispute between the parties is not moot and thus the judgments below are not subject to vacatur under this Court's decision in *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).[4]

3. Although the case may not be properly dismissed for formal mootness, these recent developments are an appropriate basis upon which this Court may wish to dismiss the writs as improvidently granted. This Court has recognized that dismissal of the writ is appropriate when there is a material change in circumstances relevant to the judgments below, *e.g.*, *Taggart* v. *Weinacker's, Inc.*, 397 U.S. 223, 224-25 (1970) (per curiam), or the litigation is no longer "meaningful," in the sense that this Court's judgment will have no significant impact on the parties, *e.g.*, *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959). Both factors are applicable here.

a. The CMS approvals represent a material change in circumstances because they are relevant to the judgments below. Those judgments were based on the

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[4] This case may be rendered moot if California disclaimed any right to reimbursement. In that event, the judgments of the lower courts would still not be subject to vacatur. *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 24 (1994) (noting that vacatur is not warranted under *Munsingwear* when case is rendered moot by voluntary action of petitioner).

district courts' determinations—affirmed by the Ninth Circuit—that the rate reductions were enacted without the reasonable access studies required by Section 30(A) of the Medicaid Act. *E.g.*, Pet. App. 28-29, 58-93 (No. 09-958). CMS now has determined, based on materials submitted in September 2011 during a separate agency review process, that the new information DHCS has submitted regarding the effects of the rate reductions was sufficient to conclude that some of the rate reductions are (at least in part) consistent with the Medicaid Act. S.G. Ltr. 1-3. The lower courts should be allowed to consider these new findings, and the materials submitted to the agency in support thereof, in assessing the proper final disposition of these cases.

To be sure, the CMS findings do not directly resolve whether the Constitution supports a right of action to enjoin preempted state laws. However, review of that fundamental constitutional question was granted by this Court on the assumption that the state laws at issue are preempted and the injunctions are of continuing effect. See Cal. Pharm. Merits Br. 1; Dominguez Merits Br. 28; ILC Merits Br. 57-59; Santa Rosa Merits Br. 8-9. Insofar as those judgments may be affected by the recent CMS findings, potentially rendering it unnecessary to reach the constitutional question presented here, that question should not be addressed until the lower courts have resolved any issues raised by the CMS findings. See, *e.g.*, *Ashwander* v. *TVA*, 297 U.S. 288, 346-49 (1936) (Brandeis, J., concurring) ("The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'").[5]

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[5] The CMS review process is not, as explained in respondents' merits briefs, a prerequisite to a preemption right of action in the federal courts and cannot reasonably be interpreted as such, particularly given that private parties cannot initiate CMS review and therefore could not be expected to "exhaust" it. *See* Cal. Pharm. Merits Br. 46-52; Dominguez Merits Br. 25-27; ILC Merits Br. 63-66; Santa Rosa Merits Br. 44; *see also, e.g.*, *Patsy* v. *Bd. of Regents*, 457 U.S. 496, 501 (1982); *Rosado* v. *Wyman*, 397 U.S. 397, 405-06 & n.8 (1970). For example, California chose to avoid the CMS review process entirely with respect to the reductions set forth in SB 6, leaving plaintiffs challenging those reductions (in *Dominguez v. Schwarzenegger*, No. 09-02306 (N.D. Cal.)) with no alternative but to seek injunctive relief under the Supremacy Clause. Moreover, as Justice Kennedy has correctly explained, "plaintiffs may vindicate ... pre-emption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes," even where other remedies—in that case, damages under 42 U.S.C. § 1983—are statutorily unavailable to the plaintiffs. *Golden State Transit Corp.* v. *City of L.A.*, 493 U.S. 103, 119 (1989) (Kennedy, J., dissenting on other grounds).

There is no reason, and no basis, for this Court to address these matters in the first instance. This is particularly true because the impact of the recent CMS decisions on the preliminary injunctions in this case, which were entered by the lower courts both before and during the period in which CMS review was pending, presents a number of new intertwined and complex administrative law issues. These include:

(1) the effect of CMS's decisions on the injunctions;

(2) the effect of CMS's decisions on the question of preemption, including whether this new administrative action should be reviewed under the Administrative Procedure Act in the first instance;

(3) the standard of review and degree of deference that should be applied in evaluating the federal and state agency actions;

(4) in examining California's compliance with the substantive Medicaid standards, what record materials are properly before the courts.

Certain of these issues were mentioned during oral argument in this Court, but they have not been briefed by the parties at any stage or considered in the first instance by the courts below.[6]

In short, although these recent developments in this case may affect the outcome—and thereby render the specific question that this Court granted certiorari to decide of mere "scholarly interest," *Rice* v. *Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955)—the issue of what impact CMS's approvals has on the underlying preemption question is not properly before the Court.

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[6] The Solicitor General's letter refers also to recent CMS approvals of certain new Medi-Cal provider payment reductions effective for dates of service on or after June 1, 2011, based on California Assembly Bill 97 (2011). S.G. Ltr. 3. These new reductions are not covered by the preliminary injunctions at issue before this court. Some of the respondents in this case have brought separate actions challenging those CMS approvals of the new payment reductions as both "arbitrary" and "capricious" pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and preempted under the Supremacy Clause. *E.g.*, *Managed Pharmacy Care* v. *Sebelius*, No. 11-9211 (C.D. Cal. filed Nov. 4, 2011). That these new actions squarely present the question of the effect of the CMS approvals decisions on the issue of preemption highlights why this Court should not decide this case in its current posture, where those issues were neither briefed nor addressed at any point.

Accordingly, those approvals provide a basis on which this Court may wish to dismiss the writs as improvidently granted.

b. This is no less true because the CMS approvals do not address all of the rate reductions. See S.G. Ltr. 1 n.* (noting that California withdrew its request for approval of certain reductions in AB 5 and did not seek approval of reductions in SB 6). The intervening state legislation discussed above independently warrants dismissal of the writs. That legislation repealed or superseded the reductions in AB 5 and AB 1183, and suspended implementation of the IHSS reductions in SB 6 until the later of July 1, 2012, or the date on which "a court of competent jurisdiction has issued an order, that is not subject to appeal or for which the time to appeal has expired, upholding [their] validity." Cal. Welf. & Inst. Code § 12306.1(d)(7)(B). Because the plaintiffs challenging the SB 6 reductions (in *Dominguez* v. *Schwarzenegger*, No. 09-02306 (N.D. Cal.)) have also asserted objections to the reductions that are independent of Section 30(A), those IHSS reductions will therefore now not take effect until after a final, non-appealable disposition resolving all challenges to their validity, and for that reason the preliminary injunction that issued in that matter (in 2009, before enactment of the intervening state suspension statute) is no longer effective or necessary. As several respondents argued at the certiorari stage, the intervening legislation therefore makes review on certiorari unwarranted. *See* Joint Supp. Cert. Br. 3 (No. 09-1158).

c. For closely related reasons, dismissal of the writs may be appropriate because, in light of these intervening circumstances, this Court's judgment may have limited practical impact. Although the preliminary injunctions issued by the district courts were of critical importance in preventing California from unlawfully implementing rate reductions that CMS had not yet reviewed, and those that CMS never approved (including the IHSS reductions in SB 6 and reductions in other provider rates during periods before January 1, 2011), and further in avoiding the irreparable harm that would have otherwise resulted to these respondents, they have no current effect, so the judgment of this Court would have no immediate or direct effect on DHCS or the plaintiffs. The only relevance of the judgment would be to determine whether or not California could seek reimbursement for amounts previously paid as a result of the preliminary injunctions.

Respondents believe that the amounts at issue in such a claim would be relatively small. Although California has in the past (including in filings before this Court) suggested that it would seek reimbursement of all amounts allegedly

overpaid as a result of the injunctions, see DHCS Merits Br. 9 n.3, in the reconsideration proceedings before CMS, the State apparently conceded that it would not seek reimbursement for periods before 2011 (and affirmatively withdrew its request for approval of the ten-percent reductions imposed by AB 5). S.G. Ltr. 2-3. CMS relied on these concessions in approving the rate reductions under review. *Id.* In light of these concessions, and the legislation repealing or superseding the enjoined rate reductions as of (at the latest) June 2011, the only period for which the State might still seek recoupment for some of the reductions are certain three-month periods during the first few months of this year. This potential relief renders the case much less "meaningful" for the parties. *Monrosa*, 359 U.S. at 184. In these circumstances, where a case presents a substantial constitutional question but only "small embers of controversy ... remain," it is appropriate to dismiss the writs as improvidently granted. *Taggart*, 397 U.S. at 225.

* * *

Review of interlocutory decisions is generally disfavored because "many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters." *Am. Constr. Co.* v. *Jacksonville, T. & Key W. Ry.*, 148 U.S. 372, 384 (1893); see also *United States* v. *Nixon*, 418 U.S. 683, 690-91 (1974). That is what has occurred here. Legislative and administrative agency developments have shifted the focus of what remains for consideration and disposition in these matters. Under these changed circumstances, the Court should consider whether the writs should be dismissed as improvidently granted so that these remaining issues are posed "less abstractly," *Monrosa*, 359 U.S. at 184, and with the benefit of relevant further briefing and legal and factual development by the lower courts.

Sincerely,

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CERTIFICATE OF SERVICE

Nos. 09-958, 09-1158, 10-283

TOBY DOUGLAS, *et al.*,
Petitioners,

v.

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., *et al.*,
Respondents.

I, Carter G. Phillips, do hereby certify that, on this 18th day of November, 2011, I caused a copy of the supplemental brief on behalf of respondents, in response to the Court's order of November 4, 2011, to be served by first class mail, postage prepaid on the following:

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